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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARTIN P. RUTHERFORD; NANJA RUTHERFORD,
PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the circuit court err in affirming the district court's denial of the Petitioners' Second Motion for New Trial when the Government withheld, sanitized and destroyed evidence?

2. Did the circuit court err in finding that the Second Motion for New Trial was time barred under Fed. R. Crim. P. 33(b)(1), when the very same court had previously vacated the judgment?

3. Is the Ninth Circuit opinion in In *United States v. Ameline* 409 F. 3d 1073, 1085 (9th Cir. 2005) inconsistent with other circuits application of United States v. Booker, 543 U.S. 220; 125 S.Ct. 738 (2005) , and does the recent U.S. Supreme Court decision of *Cunningham v. California,* 549 U.S. __, 127 S. Ct. 856 (2007) establish that Ameline is no longer good law. ?

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IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN AND NANJA RUTHERFORD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATED COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTIN RUTHERFORD and NANJA RUTHERFORD, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On January 26, 2006, the Court of Appeals for the Ninth Circuit affirmed the conviction of Martin and Nanja Rutherford. Petitioners filed a Petition for Rehearing which was denied by the Ninth Circuit Court of Appeal. Mandate was issued on March 31, 2006. Petitioners filed a writ to this Court which was denied.

On July 24, 2006, Petitioner filed a second motion for new trial based on the fact that their Fifth Amendment right to Due process of law as guaranteed by *Brady v. Maryland*, 373 U.S. 83 (1063) and *Giglio v. United States*, 405 U.S. 150 (1973) was violated, and the

discovery that evidence had been concealed, sanitized, and manipulated by the prosecution at trial. That motion was denied. *See December, 2006 Order, Appendix at 8a..*

Furthermore, Petitioners argued that they were entitled to a new trial under *United States v. Booker*, 5434 U.S. 220; 125 S.Ct. 738 (2005) which holds that the United States Sentencing Guidelines are advisory, rather than mandatory. Finally, Petitioners asked for resentencing under *Booker*, supra. *See March 6, Order Appendix at 5a*

Petitioners filed an Appeal to the Ninth Circuit Court of Appeals. On December 7, 2007, the Ninth Circuit issued its Memorandum affirming the rulings of the District Court. *Memorandum, Appendix at 1a.*

JURISDICTION

Subject matter jurisdiction for the United States District Court for the District of Nevada is found in Sections 7206(1), and 7203 of Title 26, United States Code as amended. Venue is proper pursuant to Rule 18 of the Federal Rules of Criminal Procedure. Subject matter jurisdiction for the Court of Appeals for the Ninth Circuit was invoked through 28 U.S.C. §1291.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Federal Rules of Criminal Procedure Rule 33 - time in which to file motion for new trial.

(a) Defendant's Motion.

Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) *Newly Discovered Evidence.*

Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.*

Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.

STATEMENT

a. General Background and Description

Martin Rutherford is a Chiropractor who founded and manages with his wife, Nanja, a chiropractic business known as the Chiropractic Arts Center. Petitioners were charged with failure to file an income tax return and filing a false return. At trial, the Government withheld and sanitized evidence which was material to the Petitioners position of not guilty. Furthermore, the IRS intimidated the jury in the trial.

Trial commenced on September 13, 2000. After 15 days of trial, a jury found both the Petitioners, Martin and Nanja Rutherford, guilty of violating 26 U.S.C. §7206(1) - making and subscribing a false income tax return (count one); and 26 U.S.C. §7203 - failure to file income tax return (count two). Counts 1 and 2.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURTS JUDGMENT OF CONVICTION OF MARTIN AND NANJA RUTHERFORD WHEN IT IS UNDISPUTED THAT THE GOVERNMENT DESTROYED EVIDENCE AND PROFFERED SANITIZED EVIDENCE AT TRIAL

a. The Government concealed that it had manipulated the evidence

1. Introduction.

The Respondent concealed evidence and used sanitized and incomplete exhibits at trial. Without the IMF and Internal Revenue Manual, it was impossible to expose the IRS's misconduct against the Rutherfords.

2. 1988-1990 - improper settlement and levies - Embezzlement from the Rutherfords.

The Internal Revenue Service first started to attack the Rutherfords for tax years 1988-1990. Because the Rutherfords had never had a tax problem,

they simply believed they made a mistake in taking deductions for Scientology expenditures. Accordingly, the Rutherfords were told that they had to sign a Form 870 AD, which is a settlement document. Because of potential for abuse, Form 870-AD is subject to numerous restrictions which protect both the taxpayer and the IRS. Failure to comply with the Form 870-AD procedures renders the same void . In order to properly effectuate the same, only authorized individuals can accept and execute Form 870-AD. Since the Government refused to provide the Internal Revenue Service Manual and IMF, it was impossible for the Rutherfords to learn that the IRS had no valid criminal claims against them.

3. The Form 870-AD was void and the statute of limitations had run against the Rutherfords

The 870-AD presented at trial was void becasue the appeals officer who signed it did not have the authority to do so. The consequence of a void Form 870-AD is that the time period for the Statute of Limitations is not stayed for assessment purposes. The time to assess a deficiency is 120 days following 3 years after the applicable tax return is filed. If the IRS had provided the Internal Revenue Service Manual as requested by the Rutherfords' Counsel, (or the administrative file which has since been destroyed) they could have argued that the 870-AD was defective; the Statute of Limitations on Assessment for 1988-1990 had run; and levies made for those years were illegal. Additionally, testimony representing that the levies were proper by Mr. Ward and other IRS employees, including their Counsel at trial was perjury subject to

impeachment.

4. IRM contained delegation rules that exonerated the Rutherfords from tax liability.

If no taxes were due, the penalty phase of the mandatory sentencing guidelines would have reduced the time to be served. Because the IRM was intentionally withheld from the Rutherfords, their counsel and the District Court, they were denied exculpatory evidence. When exculpatory evidence is denied, a Defendant is entitled to a new trial. The IRS was superceding the power of this Court when they were determining what evidence should be allowed and knowingly participating in litigation fraud by having an unauthorized individual execute a Form 870-AD and then concealing it by withholding evidence (i.e., the IMF and the IRM)

b. It is undisputed that the Government intentionally failed to provide the Individual Master File (IMF) which exonerates the Rutherfords from any criminal conduct.

1. Introduction.

There is no dispute that exculpatory evidence was withheld from the Rutherfords during their criminal trial. The Rutherfords were entitled to "Individual Master Files". The District Court ruled that the Government satisfied its burden to provide all exculpatory evidence by providing Form 4340, Certificate of Assessments and Payments which

included a sworn statement that it included a complete rendition of the pertinent transactions. This statement is false as the IRS failed to provide a "true and complete transcript for the period stated".

2. The Rutherfords are entitled to a new trial because the IMF was not provided

The Rutherfords did not discover this jurisdictional defect until they obtained and examined the master tax file. This occurred well after the Rutherfords were convicted. The IMF confirms that the Rutherfords case was never in appeals. If the IRS had complied with their obligations under *Brady*, the IMF would have been provided and the Rutherfords would have been able to prove that the 870-AD for 1988-1990 was void.

c. *The withholding of the Individual Master Tax File was a Brady violation*

1. Introduction

The Government does not deny it withheld, destroyed, and or sanitized evidence. This evidence was material to constitute a Brady violation. The District Court applied the narrow view that such information is only "material" if it affects the evidence of guilt or innocence. However, Brady documents are also important for the purpose of impeachment or to attack the credibility of the evidence and testimony produced at trial. This is exactly the case in the present action. The government produced certain evidence at trial, which included an ***official***

certification that the documents provided were "a true and complete transcript of the period stated" [in this case tax years 1992 and 1993]. This is a flagrant misrepresentation to deceive the Court. The actual information, which was obtained after trial in the Individual Master File showed a different story. There are many more entries in the IMF, which are suspect and would have benefitted the Rutherfords' defense in attacking the government's evidence and witness testimony. This conduct of the IRS is appalling and an insult to the integrity of this Court. To present a "certified" record that is incomplete, redacted, or changed is beyond comprehension.

The IRS was manipulating the tax records in order to create a crime which did not exist. This manipulation extended to this Court with the presentation of "certified" records which were not complete and are not supported by the IMF. The IMF held similar conflicting evidence for the 1993 tax return.

2. Respondent Failed to Disclose Exculpatory And/or Material Evidence in Petitioners' Case

Petitioners discovered Respondent refused to provide them with information and materials that are both exculpatory and material to the defense of Petitioners' case. In fact, some of this material evidence was destroyed. Specifically, Respondent failed to provide Petitioners and their counsel with the following Brady materials: (1) the Individual Master Files of the Internal Revenue Service pertaining to Petitioners; (2) the Administrative/Examination Files of the Internal Revenue Service which pertain to the Petitioners; and (3) the Internal Revenue Service

Manual.

Respondent's refusal to provide Petitioners with the Brady materials listed above violated Petitioners Fifth Amendment right to Due Process. Had the materials been provided, the jury could reasonably have taken the favorable evidence contained therein, and viewed the case in a light which would have undermined the verdict that was returned. *Kyles*, 514 U.S. 419.

In *United States v. Burford*, the Fifth Circuit Court of Appeals recognized the value of information contained in a taxpayer's Individual Master File. 889 F.2d 1406 (5th Cir. 1989). The Court stated:

> "every person who files a form 1040 has, under his social security number, a file in the IRS master computer in West Virginia. The form generated by the computer is referred to as the Individual Master File ("IMF"). The IMF consists of one or more pages of coded information for each social security recipient and includes primarily, a breakdown of all information relevant to the tax status of the individual concerning the filing of federal income tax forms, the payment of tax, refunds due, filing status, number of children, dates of filings, audits, etc."

Id.

Had Petitioners been provided with their Individual Master File, they would have been able to prove to the jury during cross-examination of government witness Gupton that: (1) the Individual Master File of Petitioners for tax period 1992 is consistent with a

determination by the Internal Revenue Service that (2) Petitioners' initial failure to file a tax return for 1992 was not due to fraud; and (3) the 1992 return allegedly filed by Petitioners, reflecting zero business income, could not be a fraudulent return because the Internal Revenue Service determined such 1992 return was an amended return.

Petitioners' Individual Master Files confirm the Internal Revenue Service made its decision to proceed with the Substitute for Return procedures on January 27, 1994, after the Internal Revenue Service had received Petitioners' zero tax return on December 23, 1993. Count 1 of the indictment charges Petitioners with filing a false federal income tax return for tax period 1992 and that the false return filed by Petitioners contained zeros.

The failure of Respondent to produce the Individual Master Files pertaining to Petitioners also prevented them from arguing and proving to the jury that Respondent had sanitized many of the evidentiary documents which it submitted to the jury in support of its case-in-chief against Petitioners.

d. The Relationship and Agreement Between the IRS and the Church of Scientology, Which Was Hidden From Petitioners, Is Exculpatory Evidence

Respondent witness Philip Valenzuela testified Petitioners signed the 870-AD on April 16, 1992. The master file of the Rutherfords confirms it was entered in their record on April 17, 1992. At all of these times, the Internal Revenue Service hid from Petitioners the fact the IRS had entered into a secret agreement with the Church of Scientology. Such agreement was

material to Petitioners' case. Such agreement allowed Petitioners' Scientology deductions. *Sklar v. Commissioner of Internal Revenue*, 282 F.3d 610; 2002 U.S. App. LEXIS 3285 (9th Cir. 2002).

With the invalidity of the signed 870 AD, Petitioners could have claimed the validity of the disallowed Scientology deductions for the years 1988, 1989, and 1990. This may have eliminated any tax liability they had for 1992 and/or 1993, particularly when added to the $50,000 paid by Petitioners upon the signing of the 870 AD and the approximate $78,000 taken from their account by the Internal Revenue Service using the invalid 870-AD and without having issued a statutory notice of deficiency.

e. Internal Revenue Service Manual

The Internal Revenue Service is required to follow its own procedures. Without the Manual detailing what such procedures and protocol are, Petitioners were unable to demonstrate to the jury the full extent to which the Internal Revenue Service had disregarded its own rules and regulations, as set forth in the Manual. This was critical evidence that should have been produced as it contained Brady materials.

The "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See *Brady v. Maryland*, 373 U.S. at 87. In this case, Respondent failed to provide evidence which would have revealed the Internal Revenue Service violated its own procedures with respect to form 870 AD as mandated by the Internal Revenue Service Manual.

The duty of the Internal Revenue Service to follow its own rules, regulations and procedures was discussed in *United States v. Tenzer*:

> A criminal tax conviction may be overturned if the Internal Revenue Service is found to have violated a provision in its manual designed to protect the constitutional right of taxpayers. *United States v. McKee*, 192 F.3d 535 (6th Cir. 1999). The rules in the Internal Revenue Manual that are pertinent to this case are the delegation of authority rules regarding an 870 AD, and the procedures for implementing substitute for return procedures. The Caceres doctrine holds that once an agency adopts a regulation, they are duty bound to obey them, even if the agency was not required by the Constitution to adopt them in the first instance. The doctrine was set forth in *United States v. Caceres*, 440 U.S. 741 (1979) where the Supreme Court noted that: 'Our decision in *Lopez [v. United States*, 373 U.S. 427 (1963)] and *[United States v.] White* 401 U.S. 745 (1971)] demonstrate that the IRS was not required by the Constitution to adopt these regulations.' (ftn. 14)

Footnote 124 reads as follows:

> It does not necessarily follow, however, as a matter of either logic or law, that the Agency had no duty to obey them. 'Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even when the internal procedures are possibly more rigorous than otherwise would be

required' (Citations omitted). Id at 751, n. 124.

950 F. Supp. 554 (USDC S.D. New York).

Brafman v. United States, 384 F.2d 863 (5th Cir. 1967) is a another tax case which is significant in that the taxpayer asserted that the certificate of assessment of tax was not signed by the property IRS official, and the court threw out the tax obligation for the IRS failure to follow its own regulations. The issue in the Rutherford case is the authority of the IRS appeal officer to sign an operative IRS document when the case is not in appeals, which is contrary to the IRS manual, essentially resulting on time to assess tax expiring which results in Rutherfords owing no tax. The Internal Revenue Service Manual also describes the delegation of authority rules for Form 870 AD. The IRS failed to follow the delegation of authority procedures required in the Manual. Without having the Manual and the Individual Master File, it was impossible for Petitioners to argue this issue at trial. This alone would be sufficient to warrant a new trial.

f. Respondent's Failure to Produce the Brady Materials, Materially Prejudiced Petitioners During Sentencing

Brady requires the Government to disclose to the defense, materials and information that are material to punishment. *Brady*, 373 U.S. 83. The Brady doctrine also requires the Government to volunteer "evidence favorable to an accused on request...where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution". *Agurs*, 427 U.S. 97. Such failure to disclose violates due process and warrants a new trial.

Pursuant to Brady, Petitioners were entitled to evidence that is relevant to the issue of punishment. At sentencing, the Court determined the amount of income tax due, without a jury finding on such fact, and considered such amount under the United States Sentencing Guidelines, in a mandatory capacity. The failure of Respondent to produce the Individual Master Files for Petitioners and the Administrative/Examination Files, materially affected the ability of Petitioners to challenge the amount of taxes due on the issue of punishment and sentencing.

g. Petitioners' Motion for New Trial Is Not Time Barred

A motion for new trial is governed by Federal Rules of Criminal Procedure Rule 33 which provides:

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly discovered evidence, Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds, Any motion for a new trial grounded on any reason other that newly discovered evidence must be filed within 7 days

after the verdict or the finding of guilty.

2005 Amend. Fed. R. Crim Proc. 33.

1. Amendments to the Federal Rules of Criminal Procedure Now Allow for a Court to Maintain Jurisdiction over a Motion for New Trial Beyond the 7 Day and 3 Year Restrictions

Prior to the 2005 amendments to Rules 33 and 45, a court was required to act on a motion for a new trial within the time specified or lose jurisdiction. Such Rules were changed by the 2005 amendments. The Notes on Advisory Committee on the 2005 amendments state:

> Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or a finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rule 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).
>
> Prior to such amendments, courts had held that the timing rule in Rule 33 was jurisdictional. For example, if a court did not rule on the request within the seven days, it lost jurisdiction to act on the underlying substantive motion. *United States v. Smith*, 331 U.S. 469,473-474 (1947). Other cases which state the time limits on Rule 33 are jurisdictional were decided prior to the 2005 amendments to Rules 33 and 45. The issue of jurisdiction has been

> significantly changed by the 2005 amendments to Rules 33 and 45. The Notes of the Advisory Committee indicate their thinking:
>
> [T]he committee believed that the rule [33] should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a period of time or lose jurisdiction to do so.
> Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider the untimely underlying motion if the court determines the failure to file it on time was the result of excusable neglect. See Notes on Advisory Committee 2005 Amend.

In light of the 2005 amendments to Rule 33, the District Court in this matter was not divested of jurisdiction to entertain a request for extension of time to file a motion for a new trial even if such was made outside the seven day and three year requirements designated by Rule 33. Rule 45(b) of the Federal Rules of Criminal Procedure, permits the Court to extend the time for filing a motion for new trial under Rule 33:

> (1) In General. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or
(B) after the time expires if the party failed to act because of excusable neglect.
(2) Exception. The court may not extend the time to take any action under Rule 35, except as stated in that Rule.

Prior to the 2005 amendment, the court was not permitted to grant extensions under Rules 29, 33, 34, 35, 37(a)(2) and 39(c) except as stated in those Rules. Significantly, the 2005 Amendment specifically omitted all but Rule 35 from this restriction. As a result, the District Court does have jurisdiction to act on a motion for new trial under Rule 33 under the 2005 amendment.

2. The Unique Context of the Present Case Warrants Consideration of Petitioners' Motion for New Trial under Rule 33

From the time of verdict to the present motion in this case, the passage of time exceeds three years. Absent excusable neglect, motions for new trial must be made within three years after verdict.

A. **The Ninth Circuit ignored the language of its opinion that vacated the judgment against the Rutherfords.**

There are several factors that should be considered in calculating the appropriate time frame under the rule. The single most unique factor in the present case is that the judgment of conviction was

vacated in the second appeal by the Ninth Circuit Court of Appeals. In an order filed June 10, 2004, the Ninth Circuit Court reversed and remanded the case to the District Court for further hearing on the issue of jury tampering and intimidation. *United States v. Rutherford*, 371 F.3d 634 (9th Cir. 2004). At that time, the United States Court of Appeals specifically vacated the judgment of the District Court and remanded the matter for an evidentiary hearing.

In the Memorandum the Ninth Circuit states that "all this court's 2004 opinion vacated was the district court's order denying their motion for new trial. *United States v. Rutherford*, 371 F.3d 634,635 (9th Cir 2004). This statement by the circuit court ignores the very language in its opinion which states:

> In sum, because the district court applied the wrong legal standard and improperly limited the scope of the evidentiary hearing, we vacate and remand for further proceedings consistent with this opinion. If upon completion of those proceedings, the district court concludes that the verdict was tainted, the **judgment of conviction** shall be set aside and a new trial may be conducted, if the prosecution so elects. Should, however, the district court determine that no jury intimidation or tampering occurred, **it shall reinstate the judgment**. VACATED AND REMANDED.

Id at 645.

If the judgment of conviction has not been vacated as the circuit court claims in its 2007 memorandum, then there would be no reason for the prior opinion to direct

the district court to **reinstate the judgment**.

Black's Law Dictionary Fifth Edition defines "vacate" as follows: to annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment. As applied to a judgment or decree the term vacate is not synonymous with suspend, which means to stay enforcement of Judgment or decree. While the Petitioners' first motion for new trial was on appeal, the District Court did not have jurisdiction, and ultimately the judgment of conviction was vacated by the Court of Appeals on June 10, 2004. When the judgment was reinstated, by the Mandate spread on the record on March 31,2006, the time to bring a second motion for new trial had ripened. Because the judgment entered against Petitioners at the time of the jury verdict was vacated on appeal, the date of the jury verdict can no longer serve as the guiding post for when the three year limitation to file begins. Once the judgment was reinstated, after a further hearing, the verdict was revalidated and then the time limitation clock began to tick all over.

B. It Is Illogical That A Party Would File An Additional Motion For New Trial, While An Appeal Is Pending on a Judgment that was already vacated.

There is no dispute that the District Court lacks jurisdiction to grant a motion for new trial while an appeal is pending. Counsel has found no authority that advises on the effect on the vacating of a judgment on the three year time limit for bringing a motion for new trial. It is logical to interpret the vacating of the

judgment as "setting aside, canceling or rescinding the judgment on jury verdict." If the judgment is vacated, it is redundant to seek another vacating of the judgment to obtain a new trial, until when and if the judgment is reinstated. So, while Rule 33(b) may provide that a party can file a motion for new trial while an appeal is pending, as a practical matter a party would not file an additional motion for new trial while a previous motion for new trial was still under Appellate review. To do so, would be to overburden the Appellate Court and would seem an inappropriate or harassing move on the part of the appellant. In this case, counsel acted quickly to move for a new trial once the judgment was reinstated in March 2006, after the first motion of new trial was concluded.

C. There Was Excusable Neglect in This Case

Also, pursuant to Rule 45(b)(1)(B) of the Federal Rules of Criminal Procedure, excusable neglect permits the filing of a motion for new trial more than three years after the verdict. Rule 45 (b)(1)(B) permits a Court to extend the time to file a motion for new trial in such a circumstance. There was been no evidence presented to support an argument that Respondent would be prejudiced by the granting of Petitioners' motion for new trial on excusable neglect grounds.

ii. The Length of the Delay was Reasonable and not Overly Long and The Reason for the Delay was Valid and Constitutes Excusable Neglect

In this case, there has been a set of unique circumstances for which there is no guiding case law. The four month delay was due to the medical condition of Defendant's counsel, Kevin Mirch, who suffered a stroke in April 2006. Respondent acknowledged and agreed that the time between issuance of the last mandate on January 23, 2006 and the time of the motion for new trial constitutes excusable delay due to Mr. Mirch's stroke.

Furthermore, as discussed above, Petitioners' delay in filing this motion for new trial was also due to the reality that a previous motion for new trial in this case was pending for some time prior. Petitioners could not practically file an additional such motion until a ruling was made on the previous one. Therefore the later filing of this motion was due to a reasonable delay and constitutes excusable neglect.

h. Under United States v. Booker Petitioners' Sentencing Should Be Set Aside

1. United States v. Booker and the Change in the Sentencing Guidelines

Prior to the United States Supreme Court's holding in *United States v. Booker*, the Federal Sentencing Guidelines and their state counterparts were mandatory. A judge had to impose a sentence within those guidelines. Booker changed that, holding that the sentencing guidelines are advisory rather than mandatory.

A. Under *United States v. Booker*, the Sentencing Guidelines Became Advisory, Rather than Mandatory

In *United States v. Booker*, the Supreme Court held the Federal Sentencing Guidelines incompatible with the Sixth Amendment because they were mandatory and imposed binding requirements on all sentencing judges. 543 U.S. 220, 233 (2005). The Court agreed that as "merely advisory provisions...[the Guidelines] would not implicate the Sixth Amendment." Id. The Federal Sentencing Guidelines, in their mandatory state, declared "the sentencing statute permits a court to depart from a guideline specified sentence only when it finds, an aggravating or mitigating circumstance of a kind or degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. Section 3553(b). This precluded judges from using their discretion to sentence a defendant outside the guidelines range.

The Guidelines are no longer mandatory in a post-Booker court. 18 USC Section 3553(b)(1) and Section 3742(e) were severed and excised having been found incompatible with Booker's constitutional holding. *Booker*, 543 U.S. at 245. Even if a defendant's sentence is not enhanced by unconstitutional fact-finding as was the case in Booker, it is still error for a court to impose a sentence under a mandatory Guideline regime. See *United States v. Webb*, 403 F.3d 373, 381 (6th Cir. 2005); *United States v. Hughes*, 401 F.3d 540, 547 (4th Cir. 2005); *United States v. Crosby*, 397 U.S. 103, 114-15 (2d Cir. 2005). However, "the

district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Booker* 543 U.S. at 264.

B. United States v. Booker Creates a New Procedural Rule Which Applies to Cases on Appeal at the Time of its Decision

In *United States v. Cruz*, the Court of Appeals for the Ninth Circuit held the Booker rule requiring juries rather than judges make the factual findings on which the sentence is based, was not a watershed rule of criminal procedure that would act retroactively, but rather a new procedural rule. 423 F. 3d 1119, 1120 (9th Cir. 2005). The United States Supreme Court has held that new procedural rules apply to cases pending on appeal at the time the rules were decided by the Court. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). Thus, Booker applies to cases on direct review at the time of the decision. This case was on direct review at the time Booker was decided and therefore Booker applies.

In *United States v. Ameline*, the Court of Appeal for the Ninth Circuit instructed that for cases pending on direct review when Booker was decided, any judge who had sentenced a defendant under the mistaken albeit understandable belief that the Guidelines were mandatory, was to determine whether the sentence would have "differed materially" had the judge applied the Guidelines as advisory. 409 F. 3d 1073, 1085 (9th Cir. 2005). Ameline requires the district court to offer an "appropriate explanation" if determining that the sentence would not have been materially different. *Id.* Petitioners' argue below that the sentencing would

have differed materially under advisory Guidelines.

C. It Is Unconstitutional for the Judge, Rather than the Jury, to Make Any Additional Finding, Other than That of a Prior Conviction, Which Enhances What the Sentence Would Have Been Based upon the Jury's Findings

The United States Supreme Court "has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 549 U.S. __, 127 S.Ct.856 (2007). The Cunningham Court went on to state, "while this rule is rooted in longstanding common-law practice, its explicit statement in our decisions is recent." *Id.* The Court's decisions in *Jones v. United States*, *Apprendi v. New Jersey*, *Blakely v. United States*, *United States v. Booker*, and its recent January 22, 2007 decision in *Cunningham v. California*, establish this constitutional rule.

Both the circuit court and the district court in the present case agreed that the holding of *United States v. Ameline* supports the ruling that *Booker* is not applicable in this case and that the extra fact finding by the court did not violate the defendants constitutional rights. However, not only is Ameline distinguishable from the case at hand, in light of the United States Supreme Court's holding in Cunningham, it may no longer be good law.

Ameline articulates a distinction that "standing alone, judicial consideration of facts and circumstances beyond those found by a jury or admitted by the defendant does not violate the Sixth Amendment right to jury trial. A constitutional infirmity arises only when extra-verdict findings are made in a mandatory guidelines system." 409 F.3d 1073, 1077-78 (2005). This is in complete contradiction to the United States Supreme Court's holding in not only Booker, but also in Apprendi, Blakely, and the recent decision of Cunningham. Extra verdict findings in a mandatory guidelines system are unconstitutional as they violate the Sixth Amendment. However, the Court has articulated that a fact found solely by a judge which enhances a defendant's sentence is also subject to Sixth Amendment scrutiny. It does not escape that solely because it was not being used to aggravate a sentence under a mandatory sentencing guideline.

Regardless, a finding that *Ameline* does control here, does not negate or even hinder defendants' argument and position in this matter. *Ameline* holds that if the "sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory,...the error was prejudicial and failure to notice the error would seriously affect the integrity, fairness, and public reputation of the proceedings." 409 F.3d at 1074-75. As argued below, the sentence here was materially different from what it could have been had the court viewed the Guidelines as advisory rather than mandatory.

D. *Cunningham v. California* and the Unconstitutionality of Sentence Elevating Fact Finding by the Judge

In *Cunningham v. California*, the Court held that California's determinate sentencing law (DSL) which placed "sentence elevating fact-finding within the judge's province" violated the "defendant's right to trial by jury [as] safeguarded by the Sixth and Fourteenth Amendments." *Cunningham, supra.* Standing on its own, the jury verdict in Cunningham limited the "permissible sentence to 12 years" *Id.* "Additional fact finding by the trial judge, however, yielded an upper term sentence of 16 years." *Id.* The Court reversed the disposition finding "the four year elevation based on judicial fact finding denied petitioner his right to a jury trial." *Id.*

The Court quoted Blakely applying the rule in *Apprendi* stating, "when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment...and the judge exceeds his proper authority." *Cunningham*, 549 U.S. __ ; quoting *Blakely*, 536 U.S. at 303. Further, "where the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence." *Id.*

E. When the Law as Laid out above Is Properly Applied to the Case at Hand, Petitioners' Sentences Should Be Set Aside

i. The Sentence as Imposed by the District Court in this Matter and the Rationale Behind it

On February 23, 2001, the Honorable Judge Edward C. Reed of the United States District Court, District of Nevada, sentenced Petitioners. The court found the total amount of tax loss to be $224, 079.70, $45,515 actual and $178,564.70 intended, and thus a base offense level of 16. This level was reduced 4 counts for downward departure after a judicial finding of extraordinary circumstances. The Petitioners were therefore sentenced on a base offense level of 12. The court overruled defendants' objections to the calculation of tax loss, which calculation in turn determined the base offense level in this case.

The court sentenced both Petitioners to five months custody to be followed by five months of home confinement with electronic monitoring upon release. The court ordered each Appellant to pay a fine of $3,000 and held them jointly and severally liable for a restitution fine in the amount of $141,812.75 and prosecution costs in the amount of $2,637.00. The court adopted the offense conduct as set forth in the presentence report as the factual basis for the sentences to be imposed.

The presentence report prepared by the probation officer in this case asserted that for "sentencing purposes, the amount of the tax that the

Rutherfords intended and attempted to reclaim, shall be used as relevant conduct in determining the appropriate base offense level." The report went on to state that the "offense level is determined largely on the basis of the aggregate harm." Citing U.S.S.G. Section 3D1.2(a) and (d). The report recommended a base offense level of 16 based upon **the probation officer's calculations of tax owing** and Sentencing Guideline Section 2T1.1(a)(1) and Section 2T4.1. In regards to the fine to be imposed on the Petitioners, the report noted that the sentencing guidelines controlled giving a fine range for the offenses involved here from $5,000 to $50,000. The report acknowledged that the sentence it recommended may seem harsh, but that the Sentencing Guidelines controlled, and the probation officer recommended low end sentencing.

In articulating his sentencing of Petitioners, the district court declared that "up until November 1, 1987 the federal judges, and I was one of them, had almost complete discretion to sentence people to whatever we felt was appropriate, and the white collar crimes violation of tax laws, being one of them, were more leniently treated than other crimes." "We often times did grant probation to people in the Rutherfords' situation, before November 1, 1987. But then along came Congress and the Sentencing Commission and they said you can't do that anymore, we're going to clip your wings."

The District Court further stated: "If you violate the law and the law provides for punishment, then my oath requires me to follow that law and to impose a reasonable punishment, based on the restraints which are placed upon me by the statutes of Congress and by the Sentencing Guidelines, which limit our authority greatly." "We are supposed ...to avoid unwarranted

disparities in sentencing. A sentence which stays within these guidelines is more likely to do that than something that I might abstractly come up with in my mind based on these very persuasive statements that have been made here to me in the presentations which are very moving and very, very good."

In imposing the $3,000 fine, Judge Reed began with imposing a $5,000 fine and reduced that whilst articulating his reasons for imposing a fine at the low end of the Guideline range. He observed that "although if you look at the net worth of the Rutherfords they are able to pay a fine, the other side of that coin and the reason I've gone to the low end is that they have - they will have a monthly cash flow that's a minus, and at such time as they may go to prison, that's going to be a very large minus, and I don't know what this will do to Dr. Rutherford's practice, but its not going to help it any, and whether they can maintain such a cash flow in the future is questionable...so all in all I think that these are reasons why the fine should be at the low end."

In determining the four count downward departure that the court did grant, Judge Reed found the factors of civic, charitable, and public service were present in an exceptional degree and that the facts supported a finding that this case was outside the heartland of the Sentencing Guidelines in relation thereto which prohibit downward departure for such factors absent a showing of exceptionability.

It is clear from the Sentencings on Jury Verdict transcript that Judge Reed sentenced the Petitioners based upon the then mandatory Federal Sentencing Guidelines. Numerous times throughout the sentencing, the Court inferred a preference for a more lenient sentence but stated preclusion thereof because

of the Guidelines. Had the Sentencing Guidelines been advisory rather than mandatory, Petitioners contend the sentence would have materially differed from what was imposed.

ii. The Sentence Imposed Would Have Been Materially Different under Advisory Guidelines and Also Violates Petitioners' Sixth Amendment Rights

Count One charged that on or about December 21, 1993, Petitioners willfully made and subscribed a false U.S. Individual Income Tax Return for the calendar year 1992. The indictment for Count One did not charge or allege any specific amount of tax loss for 1992. The jury made a sole determination of whether Petitioners were guilty of Count One as charged. The jury made no specific finding as to, nor did they address, any specific amount of tax loss for 1992.

Similarly, Count Two charged Petitioners with failing to file an income tax return for 1993. Again, the indictment for Count Two did not charge or allege any specific amount of tax loss for 1993. The jury made a sole determination of whether Petitioners were guilty of Count One as charged. The jury made no specific finding as to, nor did they address, any specific amount of tax loss for 1993.

The jury returned guilty verdicts across the board on October 4, 2000. The jury was not asked to make any specific finding as to any specific amount of tax loss for either 1992 or 1993.

Since Counts One and Two involve the same victim, they were grouped together for offense level

computations. The jury made no determination regarding the amount of tax loss if any in this case. Therefore, if one was to follow the Sentencing Guidelines, specifically sections 2T1.1 and 2T4.1, the base level offense in this matter should be 6, for each Appellant. However, the probation department proposed an upward adjustment of ten points, which was later adapted by the court. This ten point increase was based upon the probation officer's conclusion after trial that the total intended/actual loss of tax amounted to $244,377.70. Once this figure was applied to sections 2T1.1 and 2T4.1 of the Sentencing Guidelines, there was an upward adjustment based upon tax to the base offense level of 16, again adapted by the court.

There certainly was no factual finding by the jury as any amount of income tax owing for 1992 or 1993. In fact, no conclusive finding was made, until sentencing where the district court determined the amount of tax loss owing enhanced the base level of the offense by nearly double and subjected Nanja Rutherford to deportation. The effect of the ten point increase in the base offense level was to take both Petitioners out of a possible probation sentence and to place them instead where a 21-27 month range of imprisonment was required, and to deport Nanja Rutherford. Because the tax loss figure caused an increase in the base offense level under the Sentencing Guidelines, it greatly affected the ultimate sentence imposed by the court. Thus, the tax loss amount became a fact that according to the United States Supreme Court must be determined by a jury beyond a reasonable doubt. In this case, the jury determined no such fact.

CONCLUSION

Based on the foregoing arguments and in view of the multiple *Brady* violations on the part of Respondents and the new applicable standard as laid forth in *Booker* regarding sentencing, and the conflict of law on this issue among the circuits, Petitioners Martin and Nanja Rutherford request of this Court that it GRANT this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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Attorneys for Petitioners

(any footnotes trail end of each document)
No. 06-10756, No. 07-10146

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
MARTIN P. RUTHERFORD; NANJA RUTHERFORD,
Defendants - Appellants.

December 7, 2007, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Mark S. Determan, Esq., DOJ - U.S. DEPARTMENT OF JUSTICE, Criminal Enforcement Section, Washington, DC; Robert L. Ellman, Esq., USLV - OFFICE OF THE U.S. ATTORNEY, Las Vegas, NV; Alan Hechtkopf, Esq., DOJ - U.S. DEPARTMENT OF JUSTICE, Tax Division/Appellate Section, Washington, DC.

For MARTIN P. RUTHERFORD, NANJA RUTHERFORD, Defendants - Appellants: Richard W. Young, Law Offices of Richard W. Young, Reno, NV; Kevin J. Mirch, Esq., Marie Mirch, MIRCH & MIRCH, Reno, NV.

JUDGES: Before: COWEN, *** HAWKINS, and N.R. SMITH, Circuit Judges.

MEMORANDUM *

Before: COWEN,*** HAWKINS, and N.R. SMITH, Circuit Judges.

Martin and Nanja Rutherford appeal the district court's denial of their second motion for new trial. We affirm.

The district court correctly concluded that the Rutherfords' 2006 motion was untimely. Under Fed. R. Crim. P. 33, a defendant has three years *from the verdict or finding of guilty* to file a motion for new trial based on newly discovered evidence.[1] The Rutherfords argue that there was no reason for them to file their second motion for new trial while they still might be successful on the first. But this rationale flies in the face of Rule 33, which clearly contemplates that all such motions must be filed within three years *even if* there is a pending appeal (the rule only precludes the district court from *ruling* on the motion while the appeal is pending).

The Rutherfords also contend that the district court abused its discretion by failing to excuse their untimely filing under the doctrine of "excusable neglect." Fed. R. Crim. P. 45(b)(1)(B). However, the district court carefully considered the relevant factors, including the danger of prejudice to the nonmoving party, the length of the delay, the reasons for the delay and whether the moving party was acting in good faith. The court's conclusion that the Rutherfords had not offered a good

justification for their extraordinary delay was not an abuse of discretion.

The Rutherfords further claim they are entitled to a new trial, or at least resentencing, because of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). Again, the district court properly noted a variety of reasons why this claim must fail as well.

As this claim is not based on newly-discovered evidence, it should have been raised within seven days of trial. Fed. R. Crim. P. 33. Moreover, this court's mandate issued in September 2002, well before Booker was decided. Booker does not apply to convictions that were final on direct review before its pronouncement. *United States v. Cruz*, 423 F.3d 1119, 1120-21 (9th Cir. 2005).

Because our mandate had already issued, the district court also lacked authority to readjudicate the Rutherfords' sentences. See *United States v. Stump*, 914 F.2d 170, 172 (9th Cir. 1990). Rather, the proper procedure would be to file a motion in this court to recall the mandate. See *Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007). However, even if we were to construe the Rutherfords' briefing as making such a request, we would deny it. Not only is this remedy one that must be used sparingly and only in extraordinary circumstances, *id.* at 891-92, but in this case, the district court actually reviewed all the factors enumerated in § 3553 and concluded that even if it could sentence under the advisory guidelines, it would not have imposed a materially different sentence. n2

AFFIRMED.

Footnotes

***The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1Although the Rutherfords argue that this court vacated their conviction with its 2004 opinion, and that the clock did not start to run again until the conviction was "reinstated," this is inaccurate: all this court's 2004 opinion vacated was the district court's order denying their motion for new trial. *United States v. Rutherford*, 371 F.3d 634, 635 (9th Cir. 2004) ("[W]e vacate the district court's *ruling*, and remand for further proceedings.") (emphasis added).

2For the same reason, even if the Rutherfords' direct appeal was not final when Booker was decided because of their pending petition for certiorari regarding the first motion for new trial, they would at most be entitled to a limited remand under *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc), which is clearly unnecessary in this case in light of the district court's clear guidance on how it would rule under an advisory regime.

03:99-CR-159-ECR-RAM
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

VS.

MARTIN P. RUTHERFORD and NANJA RUTHERFORD,
Defendant.

MINUTES OF COURT
Date: March 6, 2007

PRESENT: EDWARD C. REED, JR., SENIOR U. S. DISTRICT JUDGE Deputy Clerk: Colleen Larsen; Reporter: Donna Davidson
U. S. Attorney, by: Mark Determan
Counsel for Defendants: Richard Young; Kevin Mirch; Marie Mirch

MINUTES OF HEARING ARGUMENTS RE BOOKER ISSUES:

At 10:10 A. M. Court convenes; defendants are present. Arguments are presented by defense counsel Young, K. Mirch and counsel for plaintiff. At 10:45 P. M. Court recesses.

At 4:05 P. M. Court reconvenes; defendants are present.

The Court announces its decision with respect to the Booker portion of defendant's motion for new trial (#302).

IT IS THEREFOR HEREBY ORDERED that the motion for new trial(# 302), filed July 24, 2006, so far as it is based on Booker error, is DENIED.

Court and counsel confer as to whether there should be a further stay of the execution of sentence previously imposed.

IT IS ORDERED that execution of the sentence of imprisonment is stayed until Friday, June 8, 2007, at 10:00 A. M., at which time defendant's shall surrender to the institution designated by the Bureau of Prisons for their incarceration. The motion for stay pending appeal, is denied. Defendants will be permitted to surrender direct to such institutions, and they must keep in close contact with their counsel to determine where they shall surrender.

Defense Counsel Young moves that defendants be allowed to stagger their surrender dates in order that both defendants are not both incarcerated at the same time, which will allow their business to continue to be open for business.

IT IS ORDERED that the execution of sentence will be further stayed, to allow defendant Nanja Rutherford to be the first to self-surrender on May 11, 2007, at 10:00 A. M., and defendant Martin Rutherford is directed to self-surrender on August 10, 2007, at 10:00 A. M., to the institutions designated by the Bureau of Prisons for their incarceration.

Defendants will be allowed to continue on their present conditions of release pending their direct surrender.
At 5:00 P. M. Court adjourns.

LANCE S. WILSON, CLERK By:
/s/
Deputy

Date: December 11, 2006

03:99-CR-159-ECR-RAM
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

VS.

MARTIN P. RUTHERFORD, and NANJA RUTHERFORD,
Defendants.

MINUTES OF COURT

PRESENT: Edward C. Reed, Jr., Senior U.S. District Judge Courtroom Deputy: Colleen Larsen; Court Reporter: Kathy French Counsel for Plaintiff: Mark Determan; Brian L. Sullivan Counsel for Defendant: Richard Young, Marie Mirch; Kevin Mirch MINUTES OF HEARING DECISION ON MOTION FOR NEW TRIAL (#302):

At 3:00 P. M. Court convenes; defendants are present. Government counsel Determan is present via telephone conference.
The Court makes its findings for the record.

IT IS ORDERED that defendant's motion for new trial (#302), is denied.
IT IS FURTHER ORDERED that this matter is scheduled for further hearing on Tuesday, March 6,

2007, at 10:00 A. M.; each side will be allowed one hour for presentation of evidence and argument pertaining solely to the "Booker" issue.

IT IS FURTHER ORDERED that the parties will have until thirty (30) days prior to the hearing within which to file any further points and authorities, which counsel wish to file in respect to the Booker issue, and the parties will have until fifteen (15) days prior to the hearing, to file contemporaneous responses.

LANCE S. WILSON, CLERK
By /s/
Deputy